United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

77-1074

To be argued by
NATHANIEL H. AKERMAN

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1074

UNITED STATES OF AMERICA,
Appellee,

—v.—

CLARK BRACEWELL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
APR 27 1977
SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1074

UNITED STATES OF AMERICA,

Appellee,

—v.—

CLARK BRACEWELL,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Clark Bracewell appeals from a judgment of conviction entered on February 4, 1977, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Charles H. Tenney, and a jury.

Indictment S76 Cr. 863, filed on December 9, 1976, charged Bracewell with three counts of violating the federal narcotics laws. Count One charged him with conspiring to violate the federal narcotics laws between March 1, 1976, and December 9, 1976, in violation of Title 21, United States Code, Section 846. Count Two charged him with distributing and possessing with the intent to distribute approximately five pounds of liquid hashish in violation of Title 21, United States Code, Sec-

tions 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2. Count Three charged him with importing into the United States approximately five pounds of liquid hashish in violation of Title 21, United States Code, Sections 812, 951, 952 and 960 and Title 18, United States Code, Section 2.

Trial commenced on December 20, 1976. On December 22, 1976, the jury found the defendant guilty on all three counts.

On February 4, 1977, Judge Tenney sentenced Bracewell to concurrent terms of imprisonment of four years on each count, to be followed by three years of special parole.

Statement of Facts

This case involved the importation of five pounds of hash oil * from Morocco into the United States by Bracewell. Bracewell did not physically carry the oil into the United States himself, but instead used his girlfriend, Helen Brown, as his courier. Upon entering the United States through the Port of New York, Brown was arrested by Customs Inspectors who discovered the hash oil in a false bottom built into her suitcase. At trial Brown was the Government's principal witness. Her testimony was corroborated by that of Amanda Cuthbert and

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* Hash oil is a liquid form of hashish, a hallucinogenic substance derived from the hemp plant. In liquid form the hashish is more potent, and therefore more valuable on the open market, than the drug in its solid form. Testimony at trial demonstrated that the five pounds of hashish oil was worth approximately $35,000, and could be sold at retail for approximately $30 per gram. (Tr. 256).

Dr. Bert Morrow, both of whom had previous contacts with Brown and Bracewell in London, England, and Murray Mogel, Brown's Court appointed attorney who after her arrest was contacted by Bracewell for the purposes of posting Brown's bail.

In September 1975, Helen Brown, an English citizen residing in London, England, met Clark Bracewell, also an English citizen, who was then sharing an apartment with two of her friends in the Islington Section of London. Approximately six months later, in April 1976, Brown became romantically involved with Bracewell, and moved into this same apartment to live with him. During the entire time that Bracewell lived in the Islington apartment, he was unemployed but nonetheless had a great deal of cash, which he used to pay his share of the rent for the apartment and which he spent on taxicabs, expensive restaurants and clothing for Brown. When Brown at one point questioned him about his source of income, Bracewell simply responded that she probably would not want to know. About this same time, however, Brown did observe hash oil in Bracewell's possession. (Tr. 44-49, 166-69, 175-79).*

In April 1976, Bracewell and Brown planned a trip to Morocco. Bracewell told Brown that he was familiar with Morocco as he had visited there previously. Bracewell made all the arrangements for the trip and paid all of the necessary costs. On June 1, 1976, Bracewell and Brown left London for Asilla, a town in Morocco. When they were in Asilla, Bracewell told Brown that the money he had been spending in London was from the

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* "Tr." refers to pages in the official transcript; "GX" refers to the Government's exhibits; and "Br." refers to the appellant's brief.

sale of drugs and that these finances were nearly depleted. To earn more money, Bracewell needed more drugs to sell and in that connection left Brown in Asilla to go to Katona, a town in the Moroccan mountains, to purchase hash oil. Bracewell told Brown that there were "dope farms" in Katona and that he knew a specific person who lived there. (Tr. 49-53, 70).

After three or four days, Bracewell returned from Katona with hash oil which he said he would sell in England. Concealing the oil in a hollowed-out chess board, Bracewell smuggled the drug out of Morocco and into England leaving Brown behind again in Asilla to await his return. Three or four days later Bracewell rejoined Brown in Asilla carrying with him the proceeds from the sale of the hash oil and a suitcase with Brown's initials imprinted on the side and containing a false bottom. Bracewell told Brown that the suitcase was for smuggling more hash oil back into England and that she would be carrying the suitcase out of Morocco through France and back to England. (Tr. 53-55, 56-57, 122).

Within six days after his return from London, Bracewell made another trip to Katona to buy more hash oil with the money he had received in London from the sale of his first purchase. This time Brown waited for him in Tangiers. After a lapse of approximately five days Bracewell appeared in Tangiers with his second purchase of oil, which he asked Brown to carry back to England in the false bottom suitcase. After several heated arguments during which Bracewell threatened Brown with the termination of their relationship if she did not assist him, Brown agreed to smuggle the suitcase containing the drug out of Morocco and into France. (Tr. 55-58).

On July 3, 1976, Brown left Morocco by herself with the suitcase for Sette, France, and travelled by train from Sette to Paris where she was met by Bracewell at

the train station. From Paris Bracewell and Brown traveled to London with the suitcase. When they reached London, Bracewell told Brown that he could realize a greater profit from the hash oil in the United States, and he persuaded her to act as his courier in smuggling the suitcase with the hash oil into the United States. Bracewell told Brown that she should carry the hash oil because as a woman she was less likely to come under suspicion and that unlike him she did not have a previous drug conviction on file with Interpol. (Tr. 58-61, 70).

To prepare for the trip to the United States, Bracewell told Brown to apply for a new passport since her present passport had been stamped by Moroccan customs officials and might arouse suspicion when she passed through customs in the United States. Brown in fact applied for and received a new passport.* (61, 62-63, 69-70, 71, 72)

Using cash, Bracewell bought Brown a ticket on the luxury liner Queen Elizabeth II, which was scheduled to leave Southampton, England, for New York on August 5, 1976, and also purchased Greyhound bus passes for Brown and himself for travel in the United States. Bracewell told Brown that he would meet her in New York outside the Customs area after she disembarked from the ship and that from there they would travel to California using the Greyhound passes. Bracewell told Brown that he did not want to accompany her on the ship because he was afraid that his name appearing on the passenger list might attract suspicion to her if it was checked against Interpol records thereby revealing his past drug record. (Tr. 63-64, 74, GX 8, GX 9).

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* Bracewell also had two passports, one of which bore a false name. He had a visitor's passport valid only for European travel which he had used to enter England from France and a regular passport which he had used to enter Morocco from England. (Tr. 61-62).

On August 5, 1976, Brown left England on the Queen Elizabeth II carrying with her the hash oil concealed in the suitcase and also took with her matching luggage which Bracewell had given her to draw suspicion away from the false bottom suitcase. On August 12, 1976, Brown disembarked from the Queen Elizabeth II in the Port of New York. In searching her luggage, Customs officials discovered the false bottom in the suitcase from which they uncovered two plastic bags. The contents were field tested and found to contain hash oil. Brown was arrested, and on that same day Murray Mogel, Esq., of the Legal Aid Society was appointed as her attorney. (Tr. 31-39, 64-66, 76, 183).

On August 11, 1976, the day before Brown had arrived in New York, Bracewell flew from London to Kennedy International Airport. On that portion of his Customs Declaration where he was required to state his permanent address Bracewell gave a false, non-existent address in Los Angeles, California. (Tr. 212-13; GX 5).

On August 18, 1976, Mogel, Brown's attorney, received a telephone call from an individual speaking with an English accent who identified himself as John Clark, a friend of Helen Brown's. Clark stated that he had heard Brown had been arrested and he wanted to know what her situation was. Mogel told Clark that she was in jail, that she had been indicted and that her bail had been set at a $1,000 cash or surety bond. When Mogel asked Clark for his telephone number, Clark responded that the phone at the place he was staying was out of order. Clark, however, did tell Mogel that he would call back. After he received this phone call, Mogel related the details of the call to the United States Attorney's Office. (Tr. 184-85, 193).

On August 24, 1976, Mogel received another telephone call from Clark who again inquired about the status of Brown's case and asked Mogel how he could go about posting her bail. Mogel told Clark that he could post bail through a bail bondsman or by sending $1,000 to Mogel who would attempt to post the bail. Mogel also told Clark that Brown intended to plead guilty and that she would likely go to jail. On August 25, 1976, Mogel received a Western Union telegraphic money order for $1,000 from John Clark in Huntington Beach, California. (Tr. 185-86, GX 10).

On August 27, 1976, Mogel received a third telephone call from Clark who wanted to know whether Brown had been released on bail. Mogel told Clark that he had received the money order, but that he could not post the bail because he was unable to reveal to the Government the source of the funds. Mogel told Clark he would return his money to him by telegram to the Western Union office at Huntington Beach. On August 30, 1976, Mogel sent a $1,000 telegraphic money order to John Clark at the Huntington Beach Western Union telegraph office in California. (Tr. 186-87).

On that same day Special Agent John McCaffrey of the Drug Enforcement Administration was at the Western Union office in Huntington Beach California. After Clark picked up the money order from the Western Union office, McCaffrey approached him and asked him if he was John Clark. Clark acknowledged that was his name, and McCaffrey placed him under arrest. Clark was advised of his constitutional rights and was searched. On his person were found $950 in cash, the Western Union money order for $1,000 payable to John Clark and a receipt for the $1,000 Western Union money order to Mogel. In the course of being questioned, Clark admitted that his

real name was Clark Bracewell and that he was a subject of Great Britain. Bracewell went on to say that he had been travelling for the last eighteen months, that he was presently unemployed but had been employed two months previously as a hi-fi salesman in London. (Tr. 209-212, 218).

ARGUMENT

POINT I

The Motion to Suppress Bracewell's Statement to Thomas Leupp of the Immigration and Naturalization Service Was Properly Denied.

Bracewell asserts that the admission into evidence of his statement on October 8, 1976, to Thomas Leupp, a criminal investigator with the United States Immigration and Naturalization Service, that in London, England, in 1973 or 1974 he had been convicted of possessing three ounces of hash oil was reversible error. Specifically, Bracewell argues that (1) he was denied his Sixth Amendment right to counsel because counsel was not present when he made his statement and that he was denied (2) his Fourteenth Amendment right to a fair trial because the effect of the prior conviction was to portray him as an evil character. Both of these claims are totally unsupported by the law or the record.

A. Facts

On December 21, 1976, Thomas Leupp, a criminal investigator with the Department of Immigration and Naturalization, testified out of the presence of the jury that on October 8, 1976, he went to the Metropolitan Correctional Center in Manhattan to interview Bracewell.

This was a routine interview conducted of all aliens who are arrested in the United States for the purpose of determining their status in this country and whether there are any grounds for deportation. The interview was not requested by the United States Attorney's Office and was not concerned with any of the facts underlying the indictment. Rather, the interview focused on Bracewell's citizenship, his last entry into the United States, and his prior arrests. (Tr. 144-45, 147).

At the beginning of the interview Leupp advised Bracewell that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had a right to speak to an attorney prior to any questioning, that an attorney could be present during the questioning, and that if he could not afford to hire an attorney, one could be appointed to represent him.* In response, Bracewell acknowledged that he understood his rights and that he had consulted with an attorney in Los Angeles who advised him not to talk to anybody until he talked to an attorney in New York. Leupp said that was fine with him. Bracewell, however, immediately went on to say "But I'll give you a statement anyway." Leupp then proceeded to question him. (Tr. 146, 147, 153).

At the conclusion of the interview, Bracewell signed a written statement acknowledging that Leupp had advised him that his statement must be given freely and voluntarily and that Leupp had advised him of his rights under the Fifth and Sixth Amendments of the United States Constitution. That portion of the statement objected to by counsel reads as follows:

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* Bracewell wisely does not challenge the completeness of the warnings given to him by Leupp, nor does he contend that his understanding of those warnings was anything less than perfect.

In 1973 or 1974 I was convicted of having three (3) ounces of hashish oil. I received probation from the court for either six or nine months. This is my only conviction of a crime anywhere. I was convicted in London, England. (GX 12)*

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* Bracewell's entire statement is as follows:

I, Clark Bracewell, acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement regarding: my last entry into the United States and my conviction of having hashish oil.

He has told me that my statement must be freely and voluntarily given and has advised me of these rights:

"You have the right to remain silent. Anything you say can be used against you in court or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will have the right to stop answering at any time until you talk to a lawyer. I am willing to make a statement without anyone present. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement: My true and correct name is Clark Bracewell. I have never used any other names. I was born in Belfast, Northern Ireland. I am a native of Ireland and a citizen of the United Kingdom and colonies. My parents are citizens of the United Kingdom and colonies. In 1967 my mother and I immigrated to the United States. I believe I left the United States the last time in about February of 1975 and I returned in August of 1976. In 1973 or 1974 I was

[Footnote continued on following page]

Subsequent to Leupp's hearing testimony, Judge Tenney specifically found that Bracewell had conferred with an attorney prior to his statement to Leupp, that Bracewell knew he had a right to remain silent and have counsel present during the interview, and that Bracewell knowingly waived this right. (Tr. 244). Earlier in a written opinion issued December 13, 1976, in response to Bracewell's pre-trial motions Judge Tenney held that evidence of Bracewell's prior conviction was relevant to proving the elements of intent and knowledge in the crimes charged in the Indictment. At the conclusion of the trial Judge Tenney instructed the jury that the evidence of Bracewell's prior conviction and any other bad acts proved by the Government but not charged in the indictment, could only be considered by the jury in determining whether Bracewell acted intentionally and knowingly if they first found that Bracewell did the acts charged in the indictment. (Tr. 334-35).

B. Bracewell was not denied his Sixth Amendment right to counsel

The first aspect of Bracewell's challenge to the admissibility of the Leupp testimony is his contention that since the statement was taken at a time when he was

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convicted of having three (3) ounces of hashish oil. I received probation from the court for either six or nine months. This is my only conviction of a crime anywhere. I was convicted in London, England. I have read (or have had read to me) the foregoing statement consisting of 1 page. I state that the answers made therein by me are true and correct to the best of my knowledge and belief and that this statement is a full, true and correct record of my interrogation on the date indicated by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement (and the correction(s) noted on page(s) 1).

under indictment, its admission into evidence violated his Sixth Amendment rights.* Bracewell relies primarily upon *Massiah* v. *United States*, 377 U.S. 201 (1964), and other cases following *Massiah* concerning the right to counsel that attaches upon indictment or the commencement of formal judicial proceedings. See *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972).

That Bracewell's Sixth Amendment right to counsel had attached at the time of the interview is acknowledged by the Government, and was expressly noted by the District Court in denying Bracewell's belated claim during trial. (Tr. 244). The true issue, to which Bracewell does not directly address himself in his brief, is whether Judge Tenney's conclusion that Bracewell validly waived that right (Tr. 244-45) was clearly erroneous. *United States* v. *Lucchetti*, 533 F.2d 28, 36 (2d Cir. 1976). Both the facts and the law demonstrate that it was not.

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* Bracewell never made a timely motion to suppress the statement on this ground. Despite the facts that the written statement was made available to him well prior to trial pursuant to F. R. Crim. P. 16 and that he made other pretrial motions, Bracewell never moved prior to trial to suppress the statement on the ground now asserted. The issue was raised for the first time during the second day of trial (Tr. 138-41).

The law is clear that motions for suppression of evidence must be made prior to trial and must set forth with clarity the grounds for suppression. F. R. Crim. P. 12; *United States* v. *Braunig;* Dkt. No. 76-1448, slip op. 2773, 2779-80 (April 11, 1977); see also *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976); *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). The governing principle is that if the decision is adverse to the Government, the Government should have an opportunity to appeal it, which is impossible under 18 U.S.C. § 3731 after the commencement of trial. *United States* v. *Mauro*, 507 F.2d 802, 805-07 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

The very recent decision of the Supreme Court in *Brewer* v. *Williams*, 45 U.S.L.W. 4287 (March 22, 1977), sheds light on Bracewell's claim. In that case, the defendant—a recent escapee of a mental institution—was arrested and arraigned on a murder charge. After consulting with two lawyers, who expressly advised him not to speak with policemen, Williams spent several hours in a car with several police officers but without the presence of counsel. Prior to doing so, his lawyer exacted an explicit promise from the officers that they would not speak with Williams during the trip. Nonetheless, during the trip the officers, without giving Williams fresh *Miranda* warnings, played upon his religious sensibilities and falsely implied that they knew where the victim's body was hidden, upon which Williams confessed to the murder. The Court, by a narrow 5-4 majority, found that Williams' right to counsel had attached (a point the State did not contest in the Supreme Court) and that he had not knowingly waived that right. In reaching this latter conclusion, the Court expressly relied upon the standard for demonstrating a waiver of those constitutional rights enunciated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).* The facts of this case, of course, are radically different. Bracewell was not only warned of his rights immediately prior to making the statement, but had actually consulted with his lawyer—a point he himself mentioned immediately prior to informing the agent that "I'll give you a statement anyway." (Tr. 146). In addition, the agent explicitly noted that it was

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* For example, the opinion of the Court refers to the "heavy burden" placed upon the Government in demonstrating the validity of a waiver. 45 U.S.L.W. at 4291. This, of course, is the precise language adopted in *Miranda* itself to delineate the standard of judging the validity of a waiver. 384 U.S. at 475. Indeed, as Judge White noted in his dissent, the standard adopted by the majority in the Sixth Amendment context is precisely the same as in cases involving the validity of waiver of *Miranda* rights. See 45 U.S.L.W. at 4300, n.5. See also *id.* at 4299, n.1.

not his intention or his practice to question Bracewell about the facts underlying his indictment, and in fact the questioning related only to those issues relevant to an INS investigation—that is, his name, citizenship and prior convictions.* Finally, of course, the situation in which his statement was taken was far less "instinct with coercion," *Bumpers* v. *North Carolina*, 391 U.S. 543, 550 (1968), than in *Brewer*.

Rather, this case is governed by numerous decisions of this Circuit in which statements made after the right to counsel had attached were found to be admissible. *United States* v. *Chong*, 544 F.2d 58, 70 (2d Cir. 1976); *United States* v. *Barone*, 467 F.2d 247, 249 (2d Cir. 1972); *United States* v. *Diggs*, 497 F.2d 391, 393 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974); *United States* v. *Reed*, 526 F.2d 740, 742-43 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976).**

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* The Supreme Court in *Brewer* noted as an important element underlying its holding that the interrogating officer "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." 45 U.S.L.W. at 4290-91. By contrast, this Court has noted that custodial statements solely about "pedigree" matters are admissible, even if no *Miranda* warnings have been given and even though the information given was highly incriminating. *Hines* v. *LaVallee*, 521 F.2d 1109, 1112-13 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976).

** Bracewell attempts to distinguish *Barone* by noting that the defendant in that case consulted with his attorney immediately prior to making the statement. This distinction is faulty. In neither *Barone* nor *Chong*, where the defendant had also consulted with an attorney, was the period of time between the consultation and the incriminating statement made clear; indeed, it is not even clear what the defendant talked with his attorney *about*. The clear implication is that *access* to an attorney satisfies the Sixth Amendment right. In any event, in this case, unlike even *Barone* and *Chong*, it was clear that Bracewell had consulted his attorney explicitly about the advisability of speaking with agents, and nonetheless determined that he wished to do so.

Bracewell's reliance upon *United States* v. *Satterfield*, Dkt. No. 76-1372, slip op. 805, 808 (2d Cir., Dec. 7, 1976), is misplaced. In *Satterfield*, a panel of this Court on an appeal by the Government upheld a District Court's determination that a waiver of Sixth Amendment rights by an indicted defendant was insufficient. The case is distinguishable since Satterfield, unlike Bracewell, not only had not consulted a lawyer but was weeping and crying at the time of the interview and, in the words of the panel, was "obviously out of control." Slip op. at 808. In addition, of course, the intended and actual effect of the interview in *Satterfield* was to obtain a confession to the facts underlying his indictment. Thus, *Satterfield* has no bearing on this case.* It follows that the trial court's disposition of Bracewell's belated Sixth Amendment claim was proper.

C. Bracewell was not denied his Fourteenth Amendment right to a fair trial by the admission into evidence of his prior conviction for possessing hash oil

Evidence of crimes other than those charged in the indictment is admissible, if relevant, except when offered

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* The *Satterfield* panel did opine that even if Satterfield's statements were valid for purposes of the Fifth Amendment, they did not meet a "higher standard" necessary to demonstrate a waiver of Sixth Amendment rights. The Government has presently pending a petition for rehearing and suggestion of rehearing *en banc* with respect to this aspect of the *Satterfield* opinion. In that petition, we suggest that this Court has already rejected the notion of a "higher standard" for indicted defendants, and that the panel's distinction of numerous cases upon which the Government relied was factually and legally inaccurate. In a letter written to the Court subsequent to the decision in *Brewer* v. *Williams*, *supra*, we urged—as we do here—that implicit in the majority's opinion and explicit in the observation of Justice White, is the holding that Sixth Amendment waivers by indicted defendants are to be judged by the same standards as waivers of *Miranda* rights by unindicted defendants.

solely to prove criminal character or disposition. *United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir. 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir. 1976); *United States* v. *Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287, 294-5 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Gerry*, 515 F.2d 130, 140-41 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied, sub. nom. Santiago* v. *United States*, 415 U.S. 976 (1974); *United States* v. *Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States* v. *Friedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967). Rule 404(b) of the Federal Rules of Evidence, which codified the pre-existing law in this Circuit, provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Bracewell's prior conviction for possession of hash oil was admissible to prove intent, knowledge and motive and to corroborate specific portions of Brown's testimony dealing with the significance of the conviction.

Prior to trial the Government anticipated that the defense would claim that Helen Brown had fabricated her testimony against Bracewell to save herself from jail, that Bracewell knew nothing about the hash oil in her suitcase, that Bracewell had happened to be in the United States at the same time as Brown, that he had heard she had been arrested and called her attorney simply to try and help and that the only reason he used an alias in speaking to Mogel was to avoid becoming entangled in Brown's problems.

Indeed, the thrust of defense counsel's opening and summation was that Brown had fabricated her testimony against Bracewell. (Tr. 27-28, 289-301). As a matter of common sense, the fact that Bracewell had possessed hash oil in 1973 or 1974 is strongly probative of the fact that he had knowledge of the hash oil seized from Brown and that he intentionally caused that hash oil to be brought into the United States through Helen Brown.

United States v. *Miller*, 478 F.2d 1315, 1318, (2d Cir.), *cert. denied*, 414 U.S. 851 (1973) is strikingly similar. In *Miller*, a bank robbery prosecution, the evidence demonstrated that the defendant was in a car outside a bank during a robbery. This court held that evidence of the defendant's involvement in another bank robbery not charged in the indictment was admissible "to show that [he] was not merely an innocent participant in the robbery for which he was tried." *Id.* at 1318. Similarly, the evidence of Bracewell's prior possession of hash oil was probative of the fact that Bracewell's relationship with Brown was not an innocent one. Indeed, the facts of this case are indistinguishable from those of a recent decision of the United States Court of Appeals for the Tenth Circuit, not yet officially reported. *United States* v. *Nolan*, — F.2d —, 21 Crim. L. Rep. 2003 (10th Cir., March 22, 1977). In *Nolan*, the Court of Appeals held that testimony by a customs agent of the defendant's 1975 British conviction for smuggling hashish was admissible under F.R. Evid. 404(b) to demonstrate the defendant's knowledge and intent in a similar smuggling operation in this country.*

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* *Nolan* also disposes of a somewhat separate issue, not precisely raised by Bracewell either at trial or in his appeal brief, of whether a prior similar act can be demonstrated by introducing proof of a conviction, rather than by live witnesses offering testimony of the similar acts themselves. At any rate,

[Footnote continued on following page]

In addition, Bracewell's prior conviction was also admissible to demonstrate his motive for not accompanying Brown on the Queen Elizabeth II. Brown testified that Bracewell told her that he did not want to accompany her on the ship because his name would appear on the passenger list, and he was afraid that this list might be checked against Interpol files, revealing to authorities his prior drug record. The fact of his past conviction thus demonstrated why he did not accompany Brown on her trip across the Atlantic and further served to corroborate Brown's testimony to this effect. This Court has held that evidence of a prior conviction can be used to corroborate the testimony of a witness whose credibility has been attacked by the defense. *United States* v. *Eliano*, 522 F.2d 201, 202 (2d Cir. 1975).

Finally, Bracewell's argument that the prejudicial effect of the prior conviction "was greatly exacerbated by the Government's constant references to defendant's life style in dealing in drugs and living sumptuously" (Br. 20) is totally frivolous. This claim is an obvious reference to the evidence showing that prior to the trip to Morocco on June 1, 1976, Bracewell had been spending large amounts of cash and had not been employed. Brown had also testified that during this same period of time she had seen hash oil in Bracewell's possession. All of this

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the acceptability of this method of proof is assured by the specific language of F.R. Evid. 803 (22). See also *United States* v. *Vario*, 484 F.2d 1052, 1054-55 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974). Indeed, in one recent decision of this Court involving the admissibility of a similar act where live witnesses testified about the act, a dissenting judge opined that proof of the similar act would have been *less* prejudicial if it had been demonstrated simply by introducing the conviction. *United States* v. *Rosenwasser*, Dkt. No. 76-1260, slip op. 1973 & n.5 (2d Cir., Feb. 24, 1977) (Gurfein, *J.*, dissenting).

evidence was clearly admissible to show the "background and development of the conspiracy" *United States* v. *Natale*, *supra* 526 F.2d at 1174; *United States* v. *Colasurdo*, 453 F.2d 585, 591 & N.3 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), and to show the existence of the conspiracy and Bracewell's participation in it. *United States* v. *Stassi*, 544 F.2d 579, 583 (2d Cir. 1976); *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 474 U.S. 823 (1973).*

This Court has emphasized that district judges have a "wide range of discretion" in determining the admissibility of similar act evidence, *United States* v. *Santiago*, *supra*, 528 F.2d at 1135, and that "the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Judge Tenney, who carefully con-

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* Indeed, the fact that Bracewell had been unemployed in London and had spent large amounts of cash, and had been observed with hash oil was directly relevant to explaining the events leading up to the conspiracy and Bracewell's financial motivation for initiating the conspiracy. When Bracewell and Brown were in Morocco, Bracewell admitted to Brown that the cash he had been spending in London was from the sale of drugs and that because these funds were nearly depleted, he had to go to Katona to buy hash oil which he would sell to replenish his finances. (Tr. 53). Included in his purchases of hash oil was the hash oil seized from Brown which had been destined for sale in the United States. Bracewell's unexplained wealth in London, about which Brown and two other witnesses testified (Tr. 47-49, 168-69, 177-78), also served to corroborate Brown in proving the existence of the conspiracy and in explaining Bracewell's role in the crime.

sidered the issue presented on the basis of the facts and the written memorandum of law presented by the Government, clearly did not abuse that discretion.

POINT II

Judge Tenney Did Not Abuse His Discretion by Admitting into Evidence the $1000 Western Union Money Order and the $950 in Cash Seized from Bracewell at the Time of His Arrest.

Bracewell asserts that Judge Tenney committed reversible error by admitting into evidence the $1000 Western Union money order from Mogel to Bracewell and the $950 in cash seized from Bracewell at the time of his arrest in Huntington Beach, California. This claim is totally without merit.

At the time the $1000 money order and $950 in cash were offered into evidence Bracewell's counsel affirmatively stated that he had no objection to their being admitted. (Tr. 213-14). Indeed, it was not until after the trial that Bracewell's counsel first raised his objection to this evidence in motions filed with the trial court on January 31, 1977. By virtue of his failure to make a proper objection to the $1000 money order and the $950 in cash, Bracewell is precluded from challenging this evidence on appeal. *United States* v. *Braunig*, *supra*, slip op. at 2778-80; *United States* v. *Rollins*, *supra*, 522 F.2d at 165; *United States* v. *Sisca*, 503 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Friedland*, 391 F.2d 378, 382 (2d Cir. 1968); *United States* v. *Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

Even if counsel had made a proper objection, the money order and cash were clearly admissible. In *United States* v. *Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975) this Court held that:

> "The possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means."

This precise language was quoted with approval in *United States* v. *Magnano*, 543 F.2d 431, 437 (2d Cir. 1976) and followed in *United States* v. *Schwartz*, *supra*, 535 F.2d at 165.*

In addition, in this case there was strong evidence that the $1,950 seized from Bracewell was the proceeds from the sale of the hash oil that Bracewell smuggled in the hollowed out chessboard from Morocco into England in June 1976, a sale that was clearly encompassed within the perameters of the conspiracy charged. Prior to making his first purchase of hash oil in Katona, Bracewell told Brown that he was buying the oil because his money was running out. This lack of funds coupled with the facts

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* Bracewell places heavy reliance on *United States* v. *Williams*, 168 U.S. 382 (1893), in which the Supreme Court held that evidence that the defendant deposited between $4000 and $5000 in his bank account the same year he allegedly extorted $100 in one instance and $85 in another instance was inadmissible to prove the extortion. *Williams*, however, has been specifically limited to its facts. *United States* v. *Tramunti*, *supra*, 513 F.2d at 1105, n. 21; *United States* v. *Jackskion*, 102 F.2d 683 (2d Cir.), *cert. denied*, 307 U.S. 635 (1939); See also *United States* v. *Mirenda*, 443 F.2d 1351, 1357 (9th Cir.), *cert. denied*, *sub. nom. Verdugo-Medina* v. *United States*, 404 U.S. 966 (1971); *United States* v. *Manning*, 440 F.2d 1105, 1109 (5th Cir.), *cert. denied*, 404 U.S. 837 (1971).

that Bracewell sold this first purchase of oil in England, that afterwards he returned to Morocco with the proceeds of that sale, that throughout this period of time he was unemployed, and that when he and Brown returned to England with the second purchase of hash oil, he spent a considerable amount of money on transportation costs for Brown and himself to travel to the United States led to the strong conclusion that the money found on Bracewell at the time of his arrest was the same money realized from the sale of his first purchase of hash oil in Morocco.*

Finally, the $1000 money order in itself was admissible to prove Overt Act Number Six of the conspiracy count and to show Bracewell's consciousness of guilt. Overt Act Number Six alleged that:

> "On or about August 25, 1976, the defendant Clark Bracewell, a/k/a John Clark sent from Huntington Beach, California, a $1,000 Western Union money order to Helen Brown."

Also seized from Bracewell at the time of his arrest was the receipt for the money order which he had sent to Mogel (GX 13). This receipt along with the money order from Mogel conclusively established the facts alleged in Overt Act Number Six. The fact that Bracewell sent the money order to Brown was also relevant to showing his consciousness of guilt. The jury could have reasonably inferred that the reason Bracewell sent the money order to Brown was because he felt responsible for her being arrested for smuggling his hash oil into the United States.

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* The fact that the Government offered the actual cash and money order into evidence rather than copies did not prejudice Bracewell. In *United States* v. *Magnano*, *supra*, 543 F.2d at 437, this Court held that the introduction into evidence of slightly more than a half a million dollars in cash was not "so inflammatory or prejudicial to outweigh its probative value."

In short, the evidence was clearly admissible, as Bracewell's attorney himself perceived at trial.

POINT III

The Evidence that Hash Oil Was Seized from Brown Was More than Sufficient.

Bracewell appears to contend that Judge Tenney erred in denying his motion for judgment of acquittal under Rule 29, F. R. Crim. P. on the ground that there was insufficient evidence to prove that the substance seized from Brown was hash oil, and alternatively, that there was insufficient evidence to prove that the substance tested and admitted into evidence was the same hash oil seized from Brown. His argument is totally frivolous.

A. Facts

On August 12, 1976, Customs Inspector McDonnell performed a field test on the material he had discovered in the false bottom of Brown's suitcase to determine whether or not this material was a controlled substance. The test consisted of placing a sample of the brown hash oil into a vial with an acid, shaking the vial, and then checking the color. In this instance the color indicated that there was good reason to believe that the brown substance was a controlled substance. Since the test proved positive, Brown was arrested and the Drug Enforcement Administration was notified. Subsequently, Inspector McDonnell turned over Brown and the suspected drugs to Special Agent Castillo of the Drug Enforcement Administration. Before giving Agent Castillo the plastic bag containing the drug substance, Inspector McDonnell initialed the plastic bag that held the sus-

pected drug. Agent Castillo brought the plastic bag to the Drug Enforcement Administration Headquarters on 57th Street in Manhattan where he weighed, sealed, labeled and initialed the exhibit, and submitted it to the evidence custodian of the Drug Enforcement Administration's Northeasterr Regional Laboratory for chemical analysis. (GX 2, Tr. 33-35, 246, 248, 251).

On August 17, 1976, William Phillips, a forensic chemist employed by the Drug Enforcement Administration, received the sealed bag containing the suspected drug exhibit from the evidence custodian, unsealed the bag, conducted a thorough chemical analysis of it, and concluded that the substance was hashish. After performing his analysis Phillips placed the hashish back in the plastic bag, resealed it, affixed a label to the bag containing his signature, date and case number, and returned the plastic bag to the evidence custodian. (Tr. 226-28, 235, 240-41).*

On November 24, 1976, Agent Castillo removed the hash oil exhibit from the Northeast Regional Laboratory and brought it to the United States Attorney's Office in order that the exhibit could be examined by Bracewell's attorney. On that same day Agent Castillo replaced the exhibit in the vault at the Region Two Headquarters of

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* Among Phillips' qualifications in conducting drug-related chemical analyses prior to being employed by the Drug Enforcement Administration were a Bachelor of Science Degree in chemistry and employment by the New York City Board of Health performing drug analyses of drug addicts' urine in a Methadone Maintenance Program. During his two and a half years employment with the Drug Enforcement Administration, Phillips received special training in drug analysis, conducted approximately 900 analyses of suspected drug substances and testified as an expert in court approximately fifteen to seventeen times. (Tr. 224-225).

the Drug Enforcement Administration, and on November 29, 1976, he returned the exhibit to the evidence [illegible]an at the Northeast Regional Laboratory. The hash [illegible] was not removed again until December 16, 1976, at which time Agent Castillo delivered it to the United States Attorney's Office for use at Bracewell's trial. At that time the exhibit appeared to be in essentially the same condition as when Agent Castillo first received it on August 12, 1976, from Inspector McDonnell. (Tr. 246-47). Except for the time that the drug was actually being examined by the chemist in his laboratory, the drug was in a heat-sealed, airtight transparent plastic bag, and indeed was offered into evidence in that container.

At the conclusion of the Government's case, Bracewell moved for a judgment of acquittal under Rule 29, F.R. Crim. P. on the ground that there was insufficient evidence for the jury to find that the exhibit offered by the Government was hash oil and that there was insufficient evidence for the jury to find that the exhibit was in fact the same substance seized from Brown on August 12, 1976. Judge Tenney denied Bracewell's motion and specifically found that there was a clear distinction between a field test by a Customs Inspector and a test in a laboratory by a trained chemist and that the Government had established a chain of custody for the hash oil exhibit from the time it was seized from Brown until it was brought into the courtroom for Bracewell's trial. (Tr. 273-74).

B. Discussion

Judge Tenney committed no error in denying Bracewell's motion for a judgment of acquittal since upon the evidence taken as a whole, a reasonable mind could only have concluded that the Government proved beyond a rea-

sonable doubt that the drug exhibit was hash oil and that it was the same hash oil seized from Brown. *United States* v. *Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Glasser*, 443 F.2d 994, 1006 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). Indeed, there was overwhelming proof to that effect.

The evidence was clear that the field test conducted by Inspector McDonnell was a far less sophisticated test than that conducted by the trained Drug Enforcement Administration chemist and that the only purpose of the field test was to ascertain immediately whether or not the substance carried in the false bottom suitcase was a controlled substance. The fact that the field test was not a full proof test certainly did not detract from the fact that a full scale professional analysis of the substance verified that it was a controlled substance and that the substance was hash oil. Similarly, the evidence concerning the chain of custody of the hash oil was abundant. Indeed, at trial Inspector McDonnell identified the exhibit by his initials appearing on the plastic bag as the same exhibit he seized from Helen Brown on August 12, 1976, and Helen Brown identified the exhibit as appearing to be the same hash oil that had been concealed in her suitcase on that same date (Tr. 69).

Thus, the requirement of authenticity of evidence prescribed by F. R. Evid. 901(a)—that evidence be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims" —was more than satisfied. *United States* v. *Natale*, *supra*, 526 F.2d at 1173; see also *United States* v. *Montalvo*, 271 F.2d 922, 925 (2d Cir. 1959), *cert. denied*, 361 U.S. 961 (1960). Particularly since there was no evidence whatsoever of even the slightest irregularity,

see *United States* v. *Chiarizio*, 525 F.2d 289, 295-96 (2d Cir. 1975), the chain of custody requirement was more than met in this case.

POINT IV

Bracewell Was Not Denied a Fair Trial by Improper Comments by the Government or Its Witnesses.

Bracewell asserts that he was denied a fair trial by (1) Brown's testimony that Bracewell told her he was going to a "dope farm," (2) the testimony that Bracewell had been unemployed but spending a great deal of cash, (3) the statement by the Assistant United States Attorney in his summation that the $1000 Western Union money order and the $950 in cash found on Bracewell were the proceeds of drug sales, (4) the testimony of Agent Cavuto that five pounds of hash oil is worth approximately $35,000 wholesale and $60,000 retail, and (5) Mogel's statement that he was "protecting her [Brown] against any person who might wish to harm her." None of these claims has any merit.

Brown testified that when she and Bracewell were in Asilla, Morocco, Bracewell told her he was going to a "dope farm" in Katona to buy hash oil. (Tr. 51-52). This statement regarding the "dope farm" was clearly admissible as an admission of Bracewell. F.R. Evid. 801(d)(2)(A).

As discussed in Point I, *supra*, the evidence that Bracewell was unemployed while at the same time spending large amounts of cash was admissible to show the background and development of the conspiracy and as evidence of the conspiracy and Bracewell's role in the conspiracy. (See p. 19, *supra*.)

Also, as discussed above in Point II, the evidence strongly supported the inference that the $950 in cash and the $1,000 Western Union money order were the profits from Bracewell's first purchase of hash oil in Katona. (See pp. 21-22, *supra.*) It certainly was not improper for the Government to argue this inference to the jury during its summation since the undisputed law in this Circuit regarding the propriety of summations to the jury is that "[w]ithin broad limits, counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence." *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968); see also *United States* v. *Ong*, 541 F.2d 331, 342-43 (2d Cir., 1976); *Malley* v. *Connecticut*, Dkt. No. 76-2072, slip. op. 1029, 1035 (2d Cir. Dec. 20, 1976); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975); *United States* v. *Gerry*, *supra*, 515 F.2d at 144.*

In regard to the value of the hash oil, Agent Cavuto testified that he had been a special agent with the Drug Enforcement Administration for five and a half years, that in June, 1974, he had personally made two undercover buys of hash oil, that he had taken part with other agents in a seizure of hash oil, that he regularly kept abreast of the price of hash oil and other drugs through reports prepared by the Intelligence Office of the Drug Enforcement Administration, that the price of hash oil has not fluctuated since 1974, and that in August 1976, the wholesale value of five pounds of hash oil was approxi-

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* In addition, Bracewell never objected to the statement in the prosecutor's summation. This in itself precludes review. *United States* v. *Head*, 546 F.2d 6, 8 (2d Cir. 1976); *United States* v. *Ong*, *supra*, 541 F.2d at 343; *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied sub nom. Benigno* v. *United States*, 423 U.S. 1059 (1976).

mately $35,000 or $40,000 and that the retail price was approximately $60,000. The Government offered no evidence concerning the percentage strength of the hash oil seized from Brown. Cavuto, however, did testify that the quality of hash oil affects the price (Tr. 254-60).

Since Bracewell was charged with the crime of possessing a drug with intent to distribute, the value of the drug was directly relevant to Bracewell's intent, that is, whether he intended to use the drug for his own personal use or to distribute or sell it to others. *United States* v. *Golden*, 532 F.2d 1244, 1247-8 (9th Cir. 1976); *United States* v. *DiNovo*, 523 F.2d 197, 202 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975); *United States* v. *Wilkerson*, 478 F.2d 813, 815 (8th Cir. 1973). Furthermore, the fact that Cavuto did not know the percentage strength of the hash oil did not affect the admissibility of his testimony. In *United States* v. *Clark*, 498 F.2d 535, 536-37 (2d Cir. 1974), this Court held that it was admissible for a drug agent to testify as an expert to the street value of heroin contained in envelopes without any knowledge of the actual weight of the powder contained in the envelopes or the percentage of heroin in the powder. The Court held that the expert could properly base his estimate "on his experience in undercover purchases, conversations with informants, literature of the BNDD, and, perhaps most importantly, the manner in which the particular material was packaged," and the Court went on to state that "whatever infirmities existed in his testimony as a result of the lack of a laboratory analysis went to the weight of his testimony and not its admissibility." *United States* v. *Clark*, *supra*, 498 F.2d at 537. Unlike *Clark*, there was evidence in this case concerning the weight of the hash oil, even though there was no evidence of its percentage strength.

Finally, Mogel's statement that he was "protecting her [Brown] against any person who might wish to harm

her" was made in direct response to a question by defense counsel on cross-examination. Bracewell's attorney was cross-examining Mogel about the telephone call he received from John Clark on August 24, 1976. The answers to defense counsel's questions elicited testimony from Mogel that during the August 24th telephone conversation with Bracewell he lied to Bracewell when he told him that Brown was still in jail. (Tr. 192-93). The questioning continued as follows:

> Q. Did you tell the Government prior to August 24th or anyone in the Government's office, such as Mr. Akerman that you had received this phone call on August 18th?
>
> A. Yes. I told Mr. Akerman and Mr. James Castillo of the Drug Enforcement Administration.
>
> Q. In other words, you as an attorney for the Legal Aid Society who defend individuals, were at this point acting as a Government agent or a conduit?
>
> A. No. I was an attorney at that moment for Helen Brown. *I was protecting her against any person who might wish to harm her.* (Emphasis supplied) (Tr. 193)

Defense counsel then proceeded to cross-examine Mogel about his reasons for believing that Brown might be in danger, and Mogel responded that his concern for Brown's safety resulted from the fact that the caller, John Clark, refused to reveal anything about himself. (Tr. 193-94).

Bracewell's counsel can hardly claim on appeal that Mogel's statement was prejudicial when it was made in direct response to his own questioning on cross-examination. Defense Counsel's question, accusing Mogel of being an agent for the Government, certainly gave Mogel the

right to explain his reasons for apprising the Government of his telephone calls from John Clark. Moreover, after Mogel responded that he was protecting Brown, Bracewell's counsel did not object to this statement or ask the Court for curative instructions. Instead, he continued to cross-examine Mogel about his reasons for believing that someone might wish to harm Brown. This failure to object by itself precludes consideration of this issue on appeal. *United States* v. *Friedland*, 391 F.2d 378, 382 (2d Cir. 1968); *United States* v. *Indiviglio*, *supra*, 352 F.2d at 277.

POINT V

Judge Tenney Properly Sentenced Bracewell.

Bracewell claims that his four-year jail sentence must be vacated because Judge Tenney abused his discretion by giving an unconscionably harsh sentence and by impermissibly punishing him for prior crimes. His arguments have no merit.

Bracewell does not contest the fact that his four-year sentence was within the fifteen year statutory maximum for each of the three felony counts for which he was convicted. In *United States* v. *Mejias*, Dkt. No. 76-1384, slip op. 2269, 2292 (2d Cir., March 10, 1977), this Court, in upholding the sentences in that case, unequivocally stated the law in this Circuit to be that "[s]entences imposed within the statutory maximum are not reviewable in this Circuit, absent the possibility that the sentence was based on material misinformation or misunderstanding concerning a defendant . . . or on constitutionally impermissible factors". See also *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974); *United States* v. *Stein*, 544 F.2d 96, 101 (2d Cir. 1976); *United States* v. *Robin*, 545 F.2d 775, 779 (2d Cir. 1976), clarified on rehearing en

banc, slip op. 2591 (March 30, 1977). Therefore, Bracewell's argument that the four-year sentence imposed on him is unduly harsh in light of the crime charged is not subject to review. *United States* v. *Tramunti, supra*, 513 F.2d at 1120; *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Minues*, 142 F.2d 388, 390 (2d Cir.), *cert. denied*, 323 U.S. 716 (1944).

Moreover, the fact that Brown received probation for her plea to a misdemeanor has no bearing on the validity of Bracewell's sentence. This Court has clearly stated that "[s]entences should not be meted out on the basis of a comparison study" and that "the modern philosophy of penology is to have the punishment fit the individual rather than the crime". *United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968). *See also United States* v. *Araujo*, 539 F.2d 287, 292 (2d Cir. 1976). *United States* v. *Needles*, 472 F.2d 652, 657-58 (2d Cir. 1973). Indeed, Judge Tenney made it clear at sentencing that he was taking into consideration both Bracewell's role in the crime and his prior background (Tr. 381-82). The evidence at trial showed that Bracewell was by far the more culpable of the two conspirators since he initiated and planned the conspiracy and that Brown's role in the conspiracy was limited to being a courier for Bracewell's hash oil. Additionally, Bracewell, unlike Brown, had a long history of drug arrests including, most notably, his conviction in England for smuggling hash oil and his arrests in Germany and Spain.

Finally, there is absolutely nothing in the record to support Bracewell's assertion that "perhaps the Court unconsciously decided to punish the defendant now for other crimes committed in the past". (Br. 39) The fact that the defendant has to use the word "perhaps" underscores the absurdity of his claim. The past crime which

the defendant particularly appears to contend that Judge Tenney punished him for was smuggling drugs into Spain for which Bracewell's wife went to jail and Bracewell was released. Bracewell argues in his brief that "[t]he Court's comments at sentencing (378-379) clearly indicate the Court thought Bracewell equally guilty as his wife for the Spanish incident". (Br. 39) There is absolutely nothing in the record, however, to support that statement. Indeed, the only person at the sentencing hearing to state that Bracewell was as equally as guilty as his wife for the crime committed in Spain was Bracewell himself. (Tr. 379). Furthermore, there was nothing improper about the fact that Judge Tenney considered Bracewell's past criminal activity in imposing sentence. It is beyond dispute that in sentencing a defendant, the trial judge should take into account the defendant's prior criminal record. *United States* v. *Schipani*, 435 F.2d 26, 27-28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

POINT VI

Bracewell Is Not Presently Entitled to the $1,000 Western Union Money Order and the $950 in Cash Seized from Him at the Time of His Arrest.

Bracewell asserts that the $1,000 Western Union money order and the $950 in cash seized from him at the time of his arrest should be returned to him immediately irrespective of the results of this appeal.

Subsequent to trial Bracewell moved the court to direct the Government to return to him the $1,000 Western

Union money order and the $950 in cash. Judge Tenney held that the Government was entitled to keep the money order and the cash in its possession until Bracewell's appeal is exhausted and until the Government is assured there are no other claims against the money. (Tr. 369). As discussed above in Point II, the money order and the cash were extremely relevant proof of the conspiracy and the Government should therefore be permitted to keep this evidence at least until Bracewell's final status is determined by the courts.

If Bracewell's conviction is affirmed, the Government intends to make a formal motion before Judge Tenney pursuant to Title 18, United States Code, Section 3006 (A)(F) that the $1,950 be applied to the reimbursement of Bracewell's attorney. Section 3006(A)(F) provides, in pertinent part, that:

> "[W]herever . . . the court finds that funds are available for payment from on or behalf of a person furnished representation, it may . . . direct that such funds be paid to the appointed attorney . . . or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section."

If Judge Tenney should grant the Government's motion, the defendant could then properly raise an appeal with this Court.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

NATHANIEL H. AKERMAN,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Cr. 863 (CHT)

UNITED STATES OF AMERICA,

—against—

CLARK BRACEWELL, a/k/a John Clark,

Defendant.

APPEARANCES:

For the Government:

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
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New York, New York 10007

By: NATHANIEL H. AKERMAN
Assistant United States Attorney

For the Defendant:

MARK E. ARROLL, Esq,
261 Broadway
New York, New York 10007

TENNEY, *J.*

Defendant is charged in a three-count indictment with conspiring to violate federal narcotics law and with illegal importation and possession with the intent to distribute of approximately five pounds of liquid hashish.

Memorandum

Defendant has submitted an omnibus motion seeking various items of information and forms of relief. The Court has considered the requests and its rulings on those in issue are as follows:

Challenge to the Grand Jury Indictment

Defendant has requested a copy of the minutes of the entire grand jury proceeding "upon the ground that there exists reasonable cause to believe that the evidence before said Grand Jury is not legally sufficient to support" the indictment. (Notice of Motion ¶ (a)). This request must be denied under the principle established in *United States* v. *Calandra*, 414 U.S. 338, 345 (1974), that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." Defendant has not substantiated his general challenge to the facially valid indictment with anything other than a statement that "the indictment is vague and conclusory." (Affidavit of Mark E. Arroll, sworn to Nov. 19, 1976, at 2). Nor has defendant demonstrated any "particularized need" to justify disclosure of the normally secret proceedings before the grand jury. *United States* v. *Weinstein*, 511 F.2d 622, 627 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975).

For the same reasons, this Court denies defendant's request (b) for an order dismissing the indictment upon the ground that the evidence presented to the grand jury was legally insufficient.

Bill of Particulars

The Government has opposed defendant's requests (c) 4, 5, 7, and 10 on the ground that defendant seeks evidentiary details of the prosecution's case. The purpose

of a bill of particulars is to amplify the charges made in the indictment so that a defendant can adequately prepare the defense of his case and avoid undue surprise and the occurrence of double jeopardy. *United States* v. *Lebron*, 222 F.2d 531 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955). The request for a bill of particulars "is not intended, however, to be a device for obtaining disclosure of government evidence or witnesses." *United States* v. *Boneparth*, 52 F.R.D. 544, 545 (S.D.N.Y. 1971); *United States* v. *McCarthy*, 292 F. Supp. 937, 940 (S.D.N.Y. 1968).

Requests (c) 4, 5, and 10 deal with evidentiary matter underlying the legal theory of the Government's case, which is not properly discoverable, and therefore the requests must be denied. Also denied is request (c) 7 which seeks to uncover the chain of Government custody of the contraband substance involved in this case. Although defendant's possession of the substance is an issue for trial, there is no basis for challenging the Government's custody of the substance after its seizure.

Defendant's request (c) 9 for a list of all papers or things seized from defendant at his arrest is apparently being complied with. (Affidavit of Nathaniel H. Akerman, sworn to Nov. 26, 1976, ¶ 11 ("Akerman Affidavit")).

Requests Under
Federal Rule of Criminal Procedure 16

Defendant's request (e) 2 for all exculpatory material in accordance with *Brady* v. *Maryland*, 373 U.S. 83 (1963), is denied on the ground that the Government's obligation under that Supreme Court decision exists independently of and apart from any ruling on a pretrial

discovery motion. *United States* v. *Boneparth*, *supra*, 52 F.R.D. at 545. Likewise, requests (e) 10 for a record of prior convictions of Government witnesses will necessarily be complied with and therefore need not be ordered. (*See* Akerman Affidavit ¶ 13).

Defendant's request (e) 8 for papers and other property obtained from defendant and presently in Government custody apparently is being complied with as necessary. (Akerman Affidavit ¶ 11).

Defendant's requests (e) 5, 6, 7, 11, and 12 are denied. These relate to names, addresses and statements of Government witnesses and need not be provided under the circumstances. The defendant has not convinced this Court of a specific need for such information which would counter the Government's evidence of need for concealment. (Akerman Affidavit ¶ 16). *United States* v. *Cannone*, 528 F.2d 296, 301-02 (2d Cir. 1975); *see United States* v. *Boneparth*, *supra*, 52 F.R.D. at 545.

Defendant's request (e) 15 with respect to Government payment of defendant's expert witness and incidental costs relating thereto is granted to the extent provided under 18 U.S.C. § 3006A(e). Defendant's request (g) to be provided with a daily transcript of the trial is granted.

Request (e) 21 for notes of arresting officers is denied. Such material will be provided at trial if necessary under *Brady* v. *Maryland*, *supra*, and 18 U.S.C. § 3500.

Reference to the Alias

Defendant's request for an order striking from the indictment all references to the alias is denied. Were the

fact of an alias irrelvant to proof of the charges contained in the indictment, reference to it would be deleted. However, the Court must accept the indication of the materiality of the existence of defendant's alias to proof of the prosecution's case (Akerman Affidavit ¶ 20), and therefore the reference to it in the indictment is retained.

Bail

Defendant's motion for reduction of bail is denied. The defendant is an English citizen who entered this country with a passport which the Government has been unable to locate (Akerman Affidavit ¶ 19), and there is no indication that defendant has roots tying him to the Southern District of New York. Under such circumstances, it is the Court's considered determination that bail should remain at its present terms.

Defendant's Prior Convictions

Defendant's request (c) 3 for a copy of defendant's arrest record and any information known to the Assistant United States Attorney with respect to the disposition of foreign proceedings against the defendant is granted to the extent not already complied with by the Government. (Akerman Affidavit ¶ 12). The Government is directed to furnish defendant with complete details of such dispositions prior to commencement of this trial.

A more difficult problem is posed by defendant's request (f) that the prosecutor be restrained from questioning the defendant or introducing into evidence any matter concerning his prior criminal record on the ground that such evidence would be both irrelevant and highly prejudicial. Evidence of defendant's prior narcotics' conviction is not sufficiently probative of his truth and veracity to overcome the obvious prejudicial impact

of its introduction and therefore will not be admitted for the purpose of impeaching defendant's credibility. Evidence of defendant's prior conviction for not carrying a valid passport is, however, very probative of truth and veracity and therefore may be introduced to impeach defendant's credibility as a witness.

It is now established that evidence of defendant's prior criminal record may be introduced in the Government's direct case where relevant to proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Federal Rule of Evidence 404(b). The Government urges that because the illegal drugs were seized from the alleged co-conspirator and not the defendant, it is likely that defendant's knowledge of the unlawful conspiracy and intent to participate in the unlawful acts thereto will be in issue. Accordingly, proof of prior similar criminal acts is significant and material evidence of such elements, and for those purposes the Court will allow introduction of the evidence. *United States* v. *Rapoport*, No. 76-1291 at 428 (2d Cir. November 4, 1976). In addition, evidence of prior criminal acts may be admitted if relevant to proof of defendant's participation in the alleged conspiracy. *United States* v. *Stassi, et al.*, No. 76-1110 at 251 (2d Cir. October 26, 1976).

In conclusion then, defendant's requests (e) 15, (g), (c) 3, and (f) are granted to the extent stated herein. Defendant's motion for other relief is denied in all respects.

So ordered.

Dated: New York, New York
December 13, 1976

.....
U.S.D.J.

★ U. S. Government Printing Office 1977— 714-017-587

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Nathaniel H. Akerman being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of April, 1977 he served ~~a copy~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Mark E. Arroll, Esq.
261 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box ~~drop for~~ for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Nathaniel H. Akerman

Sworn to before me this

27th day of April, 1977

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978